

**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

THE UNITED STATES OF AMERICA  
For the Use and Benefit of  
C. H. BENTON, INC., a California  
Corporation,

Plaintiff and Appellant,

vs.

ROELOF CONSTRUCTION COMPANY,  
doing business as TRUETT PAINTING  
COMPANY; and FIDELITY AND CASUALTY  
COMPANY OF NEW YORK,

Defendants and Appellees.

On Appeal From the United States District Court  
For the Southern District of California

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APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Appellees' brief amounts to no more than a confession of error.

ARGUMENT AND AUTHORITIES

For some unknown reason, appellees, contrary to Rule 18 (3), have chosen to completely ignore appellant's contention on this appeal (that the Trial Court's findings of fact were completely unsupported by any evidence whatsoever) and to instead, advance an unresponsive argument, manufactured entirely out of whole cloth, that the note for \$5, 736. 98 (Defendants' Exhibit A) was given for the Hanalei Hotel job and that, therefore, the cash, plus the payments received as a

result of the two assignments taken contemporaneously with the note, should have been applied to the balance of the account, i. e., the Bayview-Cabrillo job.

This same argument was advanced to the Trial Court (Rep. Tr., p. 17, ll. 4-8 and p. 39, ll. 18-21), however, the Trial Court specifically refused to rule on this point (Memorandum of Decision, p. 2, l. 32 to p. 3, l. 1), and, therefore, there is considerable doubt as to whether this argument merits any answer at all at the appellate level since, after all, this appeal was taken from the Trial Court's Judgment, not from appellees' argument at the trial.

On the other hand, appellant would not want this Court to assume from its failure to answer this argument that "silence gives consent". Therefore, appellant will proceed to answer it.

The principal fault with this argument is that it assumes that Benton's officers were out of their minds-, that they demanded a worthless promissory note in exchange for their perfectly valid lien rights on the Hanalei Hotel. This would have been completely irrational.

The second fault with this argument is that there is no relationship between the balance due on the Hanalei job on the date the note was signed of \$4, 643. 91 (\$4, 675. 46 according to the Trial Court-See Memorandum of Decision, p. 1, ll. 23-26) and the amount of the note, which was for \$5, 736. 98.

The third fault with this argument is that appellee's own evidence fails to support it.

Appellees contend in their brief (p. 9, last 3 lines) that "Defendant Roelof... stated that it was its understanding that the note was to be applied to the Hanalei

Job. . . ".

The Trial Court also indicated (Memorandum of Decision, p. 2, ll. 9-10) that it so understood the testimony of Truett.

What Truett actually said (Rep. Tr. , p. 42, ll. 1-6) was:

"My thinking at that time was the release on the Hanalei Hotel which. . . according to my books that's all we owed on. Not all but we didn't owe anything on the Cabrillo job, according to my credits on my books at that time, so I had no reason to assume that we were even discussing Cabrillo".

Truett also testified: That he did not know what the note was for (Rep. Tr. , p. 34, ll. 4-10), that there was no discussion with Benton as to what the note was for (Rep. Tr. , p. 50, ll. 5-8) that the assignments were "a part of the condition of getting the lien release" (Rep. Tr. , p. 50, ll. 23-24) that "I know it was all one transaction" (Rep. Tr. , p. 48, ll. 18-19) and that the note was "part of the open account, yes, the balance that we owed them at that time". That it was for the "difference" after the two checks "we assigned to them" (Rep. Tr. , p. 44, ll. 2-23).

The only real conflict between Truett's testimony and appellant's evidence is that whereas Charles Benton and Exhibit 4 (which was confirmed by William Benton - See Rep. Tr. , p. 73, ll. 2-4) specified exactly which accounts were covered by the note Truett was unable to so specify and he assumed that the Bayview-Cabrillo account was paid because that is what he secretly intended.

It has already been pointed out in appellant's opening brief that such secret

intentions were not only not binding on Benton but that it could not lawfully follow them in any event and the point will not be belabored further.

Appellees also contend:

1. That defendant Fidelity and Casualty Company of New York was prejudiced by the extension of time. This contention has already been answered by U. S. Fidelity and Guaranty Co. v. U. S. for the Use of Griscom-Spencer Co. , 178 F. 692 at 694, cited in appellant's opening brief.

2. That Benton changed its books and records to conform to its position at the Trial after Roelof defaulted on its note. No evidence is cited in support of this contention because there is none.

Appellees' failure to reply to appellant's contention that the Trial Court's findings are not supported by any evidence whatsoever can only be construed as an admission that there is no answer to this contention and that, accordingly, the judgment should be reversed with instructions to enter judgment for Use plaintiff as prayed for.

Respectfully submitted,

/s/ DAVID S. FOLSOM

Attorney for Plaintiff and Appellant.

## CERTIFICATION

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ DAVID S. FOLSOM

